Novartis Corp (Malaysia) Sdn Bhd v Mahkamah Perusahaan Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-638–11 OF 2019
HANIPAH FARIKULLAH, SUPANG LIAN AND SEE MEE CHUN JJCA
2 JUNE 2022

Administrative Law — Judicial review — Application — Appeal against High Court's dismissal of application for judicial review of Industrial Court's decision — Whether the dismissal of the third respondent was warranted as he failed to discharge his duty as a chief financial officer properly and with due care — Whether the order for reinstatement was the appropriate remedy

This was an appeal by the appellant (company) for the dismissal by the High Court to quash the Industrial Court's award dated 14 September 2018. The third respondent was the chief finance officer of the appellant. His last drawn salary was RM31,086 per month. The second respondent was the head of marketing and sales operations, key accounts management and market access. As of 2010, the third respondent was tasked to be one of the authorised signatories along with the second respondent, to the appellant's CitiDirect online payment. The third respondent was handed a token, known as Safeword token and a PIN number. Both the Safeword token and PIN were required to access and to authorise the CitiDirect transactions. Between 18 October 2013 to 21 November 2013, there were fraudulent transactions conducted involving sum approximately RM4.35m by one Angie Ng (Angie), an account executive from the appellant's financial reporting and accounting department. An investigation was held where it was found that several CitiDirect transactions were apparently approved by the third respondent. The essence was that the third respondent as one of the approvers for the appellant's online banking system had acted negligently and/or without exercising any proper and due care to protect the appellant's interest thereby causing financial losses to be suffered by the appellant. There was a subsequent charge for divulging confidential information regarding the business practices office process and breaching confidentiality. He was found guilty on all charges and dismissed by letter dated 21 January 2014. The Industrial Court found that the dismissal was held to be without just cause or excuse and reinstatement was ordered. On the additional charge of breach of confidentiality, it was found there was no evidence led the by appellant. The High Court affirmed the decision of the Industrial Court and concluded that the findings of the Industrial Court was consistent with the facts and evidence led before it; had taken all relevant considerations in arriving at the decision and the award did not suffer any infirmities of illegality, irrationality or procure impropriety. The issues for

consideration were: (a) whether the dismissal of the third respondent was warranted when he failed to discharge his duty; (b) whether the third respondent was able rely on the absence of control failures in the payment process as a defence; and (c) whether the order for reinstatement was the appropriate remedy.

Held, allowing the appellant's appeal in part:

(1) It was clear that decisions of inferior tribunals may be reviewed on the grounds of illegality, irrationality and possibly proportionality, which allows a scrutiny of decision not only for process but for substance. Critically, a reviewing judge ought not to disturb findings of the Industrial Court unless they are grounded on illegality or irrationality, even where the reviewing judge might have come to the same conclusion (see para 35).

(2) In this instant case, it cannot be gainsaid the fraudulent withdrawals for the period between 18 October 2013 to 21 November 2013 were all done by Angie and not the third respondent or the other second respondent. The third respondent had kept the Safeword token in his drawer in his room which was locked. There was no evidence that the third respondent had disclosed his username and password to Angie and had failed to keep such username and password safe. In fact, COW4 had given evidence that Angie had said she saw the third respondent's password from the back when she went to seek his signature for online transactions (see para 37).

(3) Even if the third respondent admitted to having a duty to keep the Safeword and password safe and a master-servant relationship requires the performance of a duty faithfully or in a manner of a fiduciary duty such that there can be dismissal if the duty is breached, that duty has not been breached by the third respondent. The root cause of the fraudulent withdrawals was correctly attributed to the lack of controls in the company. This was evident from the company's own BDO report on the recommendation to perform an immediate assessment of the payment service controls and the absence of a SOP on safety of Safeword token and password. In the absence of such SOP, the court found that it does not lie on the appellant to say that the third respondent being the chief financial officer was ultimately responsible for all procedures related to finance and cannot avail himself to the absence of control failures in the payment process as a defence (see paras 39–40).

(4) The court affirmed the decision of the High Court that the dismissal of the third respondent was without just cause and excuse. However, the High Court had erred in granting reinstatement as there may be circumstances where such a usual remedy was not appropriate. The considerations for reinstatement were high-rank position, lack of mutual

trust and confidence, no useful purpose to trust the respondent upon the appellant and the lapse of time since the appellant left the service of the bank (see paras 43, 47 & 52).

(5) The third respondent was a high-ranking officer in the company holding the position of chief financial officer which was an executive post. It has been five years since he left the service of the company when the order for reinstatement was made when he was then 55 years old. It may also be inferred that in the intervening period of five years, such a senior position would have been filled. There was also evidence the third respondent was gainfully employed although earning a fraction of his previous salary. It can be said to be reasonable to infer that given his position in the company's hierarchy, there was no useful purpose for reason of industrial harmony to thrust the third respondent upon the company (see para 50).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu (syarikat) untuk penolakan permohonan oleh Mahkamah Tinggi untuk membatalkan award yang dikeluarkan oleh Mahkamah Perusahaan bertarikh 14 September 2018. Responden ketiga adalah merupakan ketua bahagian kewangan perayu. Gaji terakhir beliau adalah RM31,086 sebulan. Responden kedua ialah ketua operasi pemasaran dan jualan, pengurusan akaun utama dan akses pasaran. Pada tahun 2010, responden ketiga telah ditugaskan untuk menjadi salah seorang penandatangan yang diberi kuasa bersama-sama dengan responden kedua kepada pembayaran dalam talian CitiDirect perayu. Responden ketiga telah diberikan token, yang dikenali sebagai token Safeword dan nombor PIN. Kedua-dua token Safeword dan PIN diperlukan untuk mengakses dan membenarkan transaksi CitiDirect. Antara 18 Oktober 2013 hingga 21 November 2013, terdapat transaksi penipuan yang melibatkan jumlah kira-kira RM4.35 juta yang dilakukan oleh Angie Ng (Angie), seorang eksekutif akaun dari jabatan pelaporan kewangan dan perakaunan perayu. Siasatan telah diadakan di mana didapati beberapa transaksi CitiDirect telah diluluskan oleh responden ketiga. Responden ketiga sebagai salah seorang yang meluluskan sistem perbankan dalam talian perayu telah bertindak cuai dan/atau tanpa menjalankan apa-apa penjagaan yang sewajarnya untuk melindungi kepentingan perayu sehingga menyebabkan perayu mengalami kerugian kewangan. Terdapat juga caj berikutnya iaitu membocorkan maklumat sulit mengenai proses amalan perniagaan pejabat dan melanggar kerahsiaan. Responden ketiga didapati bersalah atas semua pertuduhan dan telah dibuang kerja melalui surat bertarikh 21 Januari 2014. Mahkamah Perusahaan mendapati pemecatan itu dianggap tanpa sebab atau alasan yang adil dan pengembalian semula kerja telah diperintahkan. Bagi pertuduhan tambahan pecah kerahsiaan, Mahkamah Perusahaan mendapati bahawa tiada bukti yang dikemukakan oleh perayu. Mahkamah Tinggi mengesahkan keputusan Mahkamah Perusahaan dan membuat kesimpulan bahawa

penemuan Mahkamah Perusahaan adalah konsisten dengan fakta dan bukti yang dikemukakan di hadapannya dimana Mahkamah Perusahaan telah mengambil semua pertimbangan yang relevan dalam membuat keputusan dan award itu tidak mengalami sebarang kelemahan yang menyalahi undang-undang, tidak rasional atau mendapatkan ketidakwajaran. Isu-isu untuk pertimbangan adalah: (a) sama ada pemecatan responden ketiga adalah wajar apabila gagal menunaikan kewajipannya; (b) sama ada responden ketiga boleh bergantung pada ketiadaan kegagalan kawalan dalam proses pembayaran sebagai pembelaan; dan (c) sama ada perintah pengembalian semula kerja adalah remedi yang sesuai.

Diputuskan, membenarkan sebahagian permohonan perayu:

(1) Adalah jelas bahawa keputusan tribunal inferior boleh dikaji semula atas alasan menyalahi undang-undang, tidak rasional dan mungkin berkadaran, yang membenarkan penelitian keputusan bukan sahaja dari segi proses tetapi juga kandungan. Secara keseluruhan, hakim yang menyemak tidak seharusnya mengganggu penemuan Mahkamah Perusahaan melainkan ia menyalahi undang-undang atau tidak rational walaupun hakim yang menyemak mungkin telah membuat kesimpulan yang sama (lihat perenggan 35).

(2) Dalam kes ini, tidak boleh dinafikan bahawa pengeluaran secara fraud bagi tempoh antara 18 Oktober 2013 hingga 21 November 2013 semuanya dilakukan oleh Angie dan bukannya responden ketiga atau responden kedua. Responden ketiga telah menyimpan token Safeword di dalam laci di biliknya yang berkunci. Tiada bukti bahawa responden ketiga telah mendedahkan nama pengguna dan kata laluannya kepada Angie dan telah gagal untuk memastikan nama pengguna dan kata laluan tersebut selamat (lihat perenggan 37).

(3) Walau responden ketiga mengaku mempunyai kewajipan untuk memastikan nama pengguna dan kata laluan selamat, dan hubungan pekerjaan biasa antara majikan dan pekerja memerlukan pelaksanaan kewajipan dengan setia, atau dengan cara kewajipan fidusiari yang boleh menyebabkan dibuang kerja jika kewajipan itu dilanggar, mahkamah mendapati bahawa kewajipan itu tidak dilanggar oleh responden ketiga. Punca pengeluaran penipuan adalah dikaitkan dengan betul berdasarkan kekurangan kawalan dalam syarikat. Ini terbukti daripada laporan BDO perayu dimana terdapat cadangan untuk melakukan penilaian segera terhadap kawalan perkhidmatan pembayaran dan ketiadaan SOP tentang keselamatan token dan kata laluan Safeword. Dengan ketiadaan SOP sedemikian, mahkamah mendapati bahawa ia tidak terletak kepada perayu untuk mengatakan bahawa responden ketiga sebagai ketua pegawai kewangan akhirnya bertanggungjawab ke atas semua prosedur yang berkaitan dengan kewangan dan tidak dapat memanfaatkan dirinya

sendiri jika tiada kegagalan kawalan dalam proses pembayaran sebagai pembelaan (lihat perenggan 39–40).

(4) Mahkamah mengesahkan keputusan Mahkamah Tinggi bahawa pemecatan responden ketiga adalah tanpa sebab dan alasan yang adil. Walau bagaimanapun, Mahkamah Tinggi telah terkhilaf dalam memberikan pengembalian semula kerja kerana mungkin terdapat keadaan di mana remedi biasa seperti itu tidak sesuai. Pertimbangan untuk pengembalian semula kerja adalah jawatan berpangkat tinggi, tiada rasa saling percaya dan yakin, tiada tujuan berguna untuk mempercayai responden terhadap perayu dan masa berlalu sejak perayu meninggalkan perkhidmatan bank (lihat perenggan 43, 47 & 52).

(5) Responden ketiga ialah pegawai berpangkat tinggi dalam syarikat yang memegang jawatan ketua pegawai kewangan yang merupakan jawatan eksekutif. Sudah lima tahun dia meninggalkan perkhidmatan syarikat itu apabila perintah pengembalian semula kerja dibuat ketika beliau berusia 55 tahun. Ia juga boleh disimpulkan bahawa dalam tempoh lima tahun, jawatan kanan seperti itu akan diisi. Terdapat juga bukti bahawa responden ketiga telah bekerja dengan baik walaupun memperoleh sebahagian kecil daripada gaji sebelumnya. Ia boleh dikatakan munasabah untuk membuat kesimpulan bahawa memandangkan kedudukannya dalam hierarki syarikat, tidak ada tujuan berguna atas sebab keharmonian industri untuk mendorong responden ketiga kepada syarikat (lihat perenggan 50).]

Cases referred to

Hong Leong Bank Bhd v Phung Tze Thiam John Phung [2008] 2 MLJ 785; [2008] 1 LNS 921, CA (folld)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Nor [1997] 1 MLJ 789; [1997] 2 CLJ 11, SC (refd)

Malaysian Oxygen Bhd v Soh Tong Wah and another appeal [2015] 3 MLJ 730, CA (refd)

Pearce v Foster [1886] (17) QBD 536, CA (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Appeal from: Application for Judicial Review No WA-25–375–12 of 2018 (High Court, Kuala Lumpur)

Thavalingam C Thavarajah (with David Tan Seng Keat and Rebecca Sonali Alfred) (T Thavalingam & Co) for the appellant.

Alex De Silva (with Ponnie Govindasamy) (Bodipalar Ponnudurai De Silva) for the third respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the appellant company (company) whose application to quash the Industrial Court's award dated 14 September 2018 was dismissed in the High Court by order dated 3 October 2019. Both the Industrial Court and the High Court found that the dismissal of the appellant's two employees (the second and third respondents) was without just cause and excuse and ordered reinstatement.

[2] We affirmed the High Court order that the dismissal was without just cause and excuse but substituted the order of reinstatement with an order for compensation in lieu of reinstatement.

[3] We now give our reasons specifically in relation to the third respondent.

BACKGROUND FACTS

[4] The third respondent was the chief finance officer in the company commencing duties as such on 15 April 2007. His last drawn salary was RM31,1086 per month.

[5] As of 2010, he became a member of the company's pharma executive committee (PEC) and was tasked to be one of the authorised signatories along with the second respondent, to the company's CitiDirect online payment. He was handed a token, known as the Safeword token and a PIN number. Both the Safeword token and PIN are required to access and to authorise the CitiDirect transactions.

[6] Between 18 October 2013 to 21 November 2013, there were fraudulent transactions conducted in the company by one Angie Ng (Angie), an accounts executive in the company's financial reporting and accounting department. The sum involved was approximately RM4.35m.

[7] An investigation was held where it was found that several CitiDirect transactions were apparently approved by the third respondent. A domestic inquiry ensued where ten charges were levelled, all relating to CitiDirect transactions which were approved using the third respondent's Safeword token, username and password. The essence was that the third respondent as one of the approvers for the company's online banking system had acted negligently and/or without exercising any proper and due care to protect the company's interest thereby causing financial losses to be suffered by the company. These charges are found in CCB/39–40. There was a subsequent charge for divulging

confidential information regarding the business practices office (BPO) process and breaching confidentiality (CCB/52–53). He was found guilty on all charges and dismissed by letter dated 21 January 2014 (CBB/83–86).

[8] We note the second respondent was the Head of Marketing and Sales Operations, Key Accounts Management and Market Access and had similar charges levelled against her.

Industrial Court AWARD

[9] The primary issue was whether the third respondent had acted negligently ie without exercising any proper due care to protect the company's interest when he failed to secure the Safeword token and password belonging to the company thereby causing financial losses to the company (para 42).

[10] The Industrial Court had found that it was Angie who was the perpetrator of the fraudulent withdrawals amounting to RM4.35m between 18 October 2013 to 22 November 2013 (para 99). It found the company failed to prove that the third respondent's room was unlocked when Angie took his Safeword token for the fraudulent transactions (para 147) and there was no company standard operating procedure (SOP) to secure the token (para 148). Further, the third respondent had not knowingly divulged the password to Angie and that it was Angie who stole it when she saw the password from the third respondent's back at an angle and that the company's witness confirmed the company had no evidence the third respondent had failed to keep the password confidential (para 166). The third respondent was found to have done all that was necessary to ensure the Safeword token was secure and the username and password kept confidential (para 188). Ultimately the root cause of the fraudulent transactions was due to control failures in the payment process as identified in the BPO report that the company 'should perform an immediate assessment of the payment process controls' (paras 176–178) and that it was unfair and unreasonable to blame the employees when the BPO report highlighted the company's shortcomings as the root cause (para 189).

[11] On the additional charge of breach of confidentiality, it was found there was no evidence led by the company (para 169).

[12] The dismissal was held to be without just cause or excuse and reinstatement was ordered.

[13] In para 201 it was stated that the third respondent was 55 years old at the time of hearing and at his age, it would be difficult to get a job of similar standing. As there was no proven misconduct, the trust and confidence should not be considered tainted. There were also no exceptional circumstances

warranting a departure from the fact that when termination is unjustified and not bona fide, the normal relief is reinstatement (para 202).

High Court DECISION

[14] The High Court referred to *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 on the test in reviewing findings of fact made by an Industrial Court. Essentially, decisions of inferior tribunals may be reviewed on the grounds of illegality, irrationality, and possibly proportionality which allows a scrutiny of a decision not only for process but for substance. Further, a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or irrationality, even where the reviewing judge might not have come to the same conclusion.

[15] The High Court stated the Industrial Court had made a finding of fact that Angie was the perpetrator of the fraudulent withdrawals at the material time. There was no SOP in securing the Safeword token, as confirmed by COW2 , the security manager. It was the third respondent's evidence he kept his Safeword token safe under his care and custody in his drawer in his locked room. Both COW2 and COW4 (associate director, company security) agreed that leaving the Safeword token in a locked room was safe and it was confirmed the room was locked. COW2 had also confirmed the company had no evidence the third respondent had failed to keep the password confidential.

[16] Breach of confidentiality had not been proved. COW2 had agreed this was not an issue for dismissal where it was primarily based on divulging the password and the safety of the Safeword token.

[17] The High Court was of the view that the Industrial Court had rightly concluded the third respondent had not acted below the reasonable standard and there was unrebutted evidence that Angie had stolen his password and/or username.

[18] Due consideration was given that when the case was pending in the Industrial Court, there was a concurrent proceeding in the Kuala Lumpur High Court vide Civil Suit No 22NCVC-291–06 of 2015 premised on negligence based on the same facts. The High Court there held the third respondent was not negligent in discharging his duties and obligations towards the company. There was no appeal and the company must be deemed to have accepted the same.

[19] The High Court concluded that the findings of the Industrial Court are consistent with the facts and evidence led before it; had taken all relevant

considerations in arriving at the decision and the award did not suffer any infirmities of illegality, irrationality or procedure impropriety.

[20] The application for judicial review to quash the Industrial Court award was therefore dismissed.

SUBMISSIONS OF THE APPELLANT COMPANY

[21] Before us, the company mounted various grounds of challenge.

[22] The first ground related to the failure of the High Court to take into account the admission that the third respondent was a senior officer of the company and entrusted as an authorised signatory to safeguard the Safeword token and password.

[23] It relied on *Pearce v Foster* [1886] (17) QBD 536 that 'where a person has entered into the position of servant, if he does anything incompatible with the due and faithful discharge of his duty to his master, the latter has the right to dismiss him'. As per BR Ghaiye in *Misconduct in Employment Contract*, the servant stands in a fiduciary relation such that an act inconsistent with the fiduciary relationship will be an act of bad faith for which the services can be terminated.

[24] It was thus submitted dismissal was warranted.

[25] The next ground of challenge concerned the finding that the root cause of the fraudulent withdrawals was the control failures in the payment process. It was submitted that the third respondent being the chief financial officer was ultimately responsible for all procedures related to finance and cannot therefore, rely on the absence of control failures in the payment process as a defence.

[26] A further challenge was that the finding that 'it was Angie who stole the password from the third respondent when she saw the password from the third respondent's back at an angle' was perverse and unsupported by any evidence. What was relied on was the testimony of COW4 who did not possess any direct evidence on the issue.

[27] The final ground of challenge centred on the order of reinstatement. There was an error in law as no regard was had for industrial harmony bearing in mind the seniority of position and that five years had lapsed since the dismissal. It was submitted this court's decision in *Hong Leong Bank Bhd v Phung Tze Thiam John Phung* [2008] 2 MLJ 785; [2008] 1 LNS 921 had been

ignored. It was held in that case there may be circumstances where reinstatement is inappropriate.

[28] Regard should also be had to the Supreme Court decision in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Nor* [1997] 1 MLJ 789; [1997] 2 CLJ 11 which listed the factors to be considered when ordering reinstatement or otherwise.

SUBMISSIONS OF THE THIRD RESPONDENT

[29] It was submitted that the courts will not interfere with the findings of fact made by a tribunal unless on the ground of illegality, irrationality and procedural impropriety, *Malaysian Oxygen Bhd v Soh Tong Wah and another appeal* [2015] 3 MLJ 730. The High Court had agreed with the findings of the Industrial Court where the findings were supported by evidence and held the allegations against the third respondent had not been proved.

[30] With regard to the admission that as a senior personnel there was an absolute duty to keep the Safeword token and password safe, this has to be looked at in the context of the evidence that the duty had not been breached.

[31] The root cause of the fraudulent withdrawals was supported by the company's BPO and the recommendation to perform an immediate assessment of the payment process controls.

[32] The finding that it was Angie who stole the password from the third respondent came from COW4 herself.

[33] With regard to the order for reinstatement, it was submitted that reinstatement is the primary remedy. The company had not pleaded any facts or provided any evidence that the third respondent's previous position was filled or made any submission why reinstatement was not an appropriate remedy during the Industrial Court proceedings. The Industrial Court had given its reasons for reinstatement.

[34] It was finally submitted the Kuala Lumpur High Court Civil Suit No 22NCVC-291–06 of 2015 against the third respondent was premised on negligence based on the same facts. The High Court there held the third respondent was not negligent in discharging his duties and obligations towards the company. There was no appeal and the company must be deemed to have accepted that such a decision is final and binding. Although the claims were different, the subject matter of both suits is the same ie whether the third respondent had been negligent and thereby caused the loss of the money fraudulently withdrawn by Angie.

OUR DECISION

Dismissal without just cause and excuse

[35] It is clear that decisions of inferior tribunals may be reviewed on the grounds of illegality, irrationality, and possibly proportionality, which allows a scrutiny of decision not only for process but for substance. Critically, a reviewing judge ought not to disturb findings of the Industrial Court unless they are grounded on illegality or irrationality, even where the reviewing judge might not have come to the same conclusion. If authority for this proposition is required, one can look no further than *Ranjit Kaur* where this was stated:

> [15] ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinize the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.
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> [17] The Federal Court, in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.
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> [19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review.

[36] The same too was said in *Malaysian Oxygen Bhd* at p 741 where it was stated the test for intervention in judicial review is 'whether there was abuse of the power or unfair treatment by the Industrial Court for example illegality, procedural impropriety, unreasonableness or possibly proportionality'.

[37] In this instant case, it cannot be gainsaid the fraudulent withdrawals for the period between 18 October 2013 to 21 November 2013 were all done by Angie and not the third respondent or the other second respondent. These were

transacted using their Safeword token and password. The third respondent had kept the Safeword token in his drawer in his room which is locked. Viewed in the light of COW2's evidence there was no SOP on the safety of the Safeword token, it is reasonable to conclude that it is safe for it to be left in the locked room. There was also no evidence that the third respondent had disclosed his username and password to Angie and the fact of COW2's evidence that the company had no evidence the third respondent had failed to keep such username and password safe. In fact, COW4 had given evidence that Angie had said she saw the third respondent's password from the back when she went to seek his signature for online transactions. This was what led the Industrial Court to conclude Angie stole the third respondent's password as she saw it from his back by looking at an angle.

[38] Under the circumstances, even if the third respondent admitted to having a duty to keep the Safeword token and password safe and a master-servant relationship requires the performance of a duty faithfully or in a manner of a fiduciary duty such that there can be dismissal if the duty is breached, that duty has not been breached by the third respondent.

[39] The root cause of the fraudulent withdrawals was correctly attributed to the lack of controls in the company. This was evident from the company's own BOO report on the recommendation to perform an immediate assessment of the payment service controls and the absence of a SOP on safety of Safeword token and password.

[40] In particular, in the absence of such a SOP as referred to above, we find it does not lie on the company to say that the third respondent being the chief financial officer was ultimately responsible for all procedures related to finance and cannot avail himself to the absence of control failures in the payment process as a defence.

[41] We were also inclined to accept that the outcome of the Kuala Lumpur High Court Civil Suit No 22NCVC-291–06 of 2015 against the third respondent had a bearing on these proceedings. Although the claims were different, the subject matter of both suits is the same ie whether the third respondent had been negligent and thereby caused the loss of the money fraudulently withdrawn by Angie. The High Court there held the third respondent was not negligent in discharging his duties and obligations towards the company. There was no appeal and the company must be deemed to have accepted that such a decision is final and binding.

[42] We conclude on this point by finding there was nothing unreasonable about the decision of the High Court in dismissing the application to quash the Industrial Court award. The Industrial Court had made findings of fact

pertaining to the third respondent safely keeping the Safeword token in a drawer in his locked room, had not disclosed his username or password to Angie, that it was Angie who stole the password, as it were, the absence of SOP on safety of Safeword token and password, and the root cause being the lack of controls, and these were unassailable and supported by evidence.

Order for reinstatement

[43] We are however of the view that based on the facts and circumstances of the case, the High Court had erred in granting reinstatement. We do recognise that reinstatement is the usual remedy that is awarded but there may be circumstances where such a usual remedy is not appropriate.

[44] The Industrial Court had this to say of the third respondent at CCB/146–147:

> [200] The second claimant was 55 years of age at the time of hearing. The second claimant has served the company well for almost seven years at the time of his dismissal. The second claimant is gainfully employed at a Buddhist Association but only earning a fraction of what he used to earn. At his age it would be difficult to get a job of similar or equivalent standing. There being no proven misconduct, the trust and confidence the company had in the second claimant over the years should not be considered tainted.
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> [201] There were no exceptional circumstances warranting a departure from the fact where the termination of service is unjustified and not bona fide, the normal relief is reinstatement. The burden to establish exceptional circumstances is on the company which the company has failed to do. In addition there was no evidence before the court that the relationship between the parties had broken down so badly that it would not be conducive to industrial harmony to return the claimants to their place of work.
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> [202] In the circumstances the remedy of reinstatement is therefore the only reasonable just and proper remedy that is appropriate to meet the facts and circumstances of the present case.
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> [203] Due to the factors above, an order or reinstatement would be appropriate as it not only ensures the first and second claimant did not lose seniority of service and benefits flowing there from but also more importantly dignity and standing within the company and externally.

[45] It had earlier stated the following:

> [198] ... Past record of the employee, the nature of their alleged lapse, conduct of the Claimants and the ground on which the order of the company is set aside are relevant factors for consideration (see *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Nor* [1997] 1 MLJ 789; [1997] 2 CLJ 11).

[46] We find that no consideration was given to *Hong Leong Bank Bhd*. In

A that particular case, this court examined the circumstances under which reinstatement may not be ordered. It had this to say:

> [19] In the present case, the Industrial Court found that it was not practical for reason of industrial harmony to reinstate the respondent. The High Court was of a different view and ordered reinstatement. With utmost respect, we are unable to agree with the learned High Court judge. No doubt reinstatement is the usual remedy that is awarded in industrial law. But there may be circumstances where the reinstatement is inappropriate. The present case is such a case.
>
> [20] The respondent held reasonable high ranking position. He was the head of the appellant's branch in Tawau. On the facts of this case, mutual trust and confidence is lacking between the parties. There is no useful purpose, for reason of industrial harmony to thrust the respondent upon the appellant. More so in this case, the respondent had left the services of the appellant for five and a half years when the order of reinstatement was made by the High Court. Taking into account all the facts and circumstances of the case, we are of the view that the proper remedy in this case is compensation in lieu of reinstatement as ordered by the Industrial Court.

[47] The considerations for reinstatement were high-rank position, lack of mutual trust and confidence, no useful purpose to thrust the respondent upon the appellant and the lapse of time since the appellant left the service of the bank.

[48] *Kumpulan Perangsang Selangor* was given due consideration in *Hong Leong Bank Bhd* at para 17 where the factors required to be taken into account when considering whether to order reinstatement were as follows:

(i) the past record of employee;

(ii) the nature of his alleged lapse;

(iii) the conduct of the workman ie whether he had contributed to his own dismissal;

(iv) nature of relations between the employer and the employee;

(v) the nature of duties performed by the employee; and

(vi) the nature of industrial establishment.

[49] We pause to note that in that case, it was considered that the respondent performed an executive position in a recreational club and reinstatement was not the appropriate remedy.

[50] Similarly in our case, the third respondent was a high-ranking officer in the company holding the position of chief financial officer which is an executive post. It has been five years since he left the service of the company when the order for reinstatement was made when he was then 55 years old. It may also be inferred that in the intervening period of five years, such a senior

position of chief financial officer would have been filled. There was also evidence the third respondent was gainfully employed although earning a fraction of his previous salary. The Industrial Court found that the trust and confidence the company had in the third respondent was not tainted as there was no proven misconduct and there was no evidence that the relationship of parties had broken down so badly that it would not be conducive to industrial harmony to return the third respondent to work. Be that as it may, it can be said to be reasonable to infer that given his position in the company's hierarchy, there is no useful purpose for reason of industrial harmony to thrust the third respondent upon the company.

[51] We would thus adopt the principle and approach in *Hong Leong Bank Bhd* and hold that reinstatement is not the appropriate remedy for the reasons we have given above.

CONCLUSION

[52] The appeal is therefore allowed in part where the order for reinstatement is substituted with an order for compensation in lieu of reinstatement. The order of tile High Court that the dismissal of the third respondent is without just cause and excuse, is affirmed. We exercise our discretion and make no order as to costs.

Appeal allowed in part.

Reported by Rafinie Ramli